Supreme Court, U.S.
FILED
'99 165 JUL 22
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WILLIE HICKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, *et seq.*, forbids the exclusion of a prospective juror from service without a trial court determination of record that the excluded juror is disqualified or excused on a ground expressly authorized by the Act?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Anthony Dailey was a party before the court of appeals.

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Petitioner Willie Hicks respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The United States District Court for the Southern District of Georgia did not enter a written order in connection with the exclusion of the prospective jurors from the panel. Excerpts from the trial transcript containing the District Court's findings and conclusions of law are reproduced in Appendix B. The opinion of the United States Court of Appeals for the Eleventh Circuit was designated as "do not publish" and thus is not officially reported. A copy of that opinion is set forth in Appendix A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered on April 23, 1999. Petitioner Hicks did not file a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1861:

Declaration of policy

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein

the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1862:

Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

28 U.S.C. § 1863:

Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title.

* * *

(b) Among other things, such plan shall —

* * *

(5)(A) except as provided in subparagraph (B), specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(B) specify that volunteer safety personnel, upon individual request, shall be excused from jury service. For purposes of this subparagraph, the term "voluntary safety personnel" means individuals serving a public agency (as defined in section 1203(6) of title I of the Omnibus Crime Control and Safe Streets Act of 1968) in an official capacity, without compensation, as firefighters or members of a rescue squad or ambulance crew.

* * *

28 U.S.C. § 1865:

Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent

evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he —

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 U.S.C. § 1866:

Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered, certified, or first-class mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by mail, the summons may be served by the marshal or by the clerk, the jury commission or their duly designated deputies, who shall make affidavit of service and shall attach thereto any receipt from the addressee for a registered or certified summons.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided,* That any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court

that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

* * *

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

* * *

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

STATEMENT OF THE CASE

Petitioner Hicks was charged in ten counts of a nineteen-count indictment.[1] Following a jury trial, Hicks was found

1. Three others were charged in this indictment. Hicks was charged with conspiracy to possess with intent to distribute and distribution of cocaine in violation of 18 U.S.C. § 841(a)(1), 18 U.S.C. § 2 and 18 U.S.C. § 846 (count 1); possession with intent (Cont'd)

guilty on eight counts; the government dismissed the two remaining counts against him. This petition relates solely to the trial court's *sua sponte* exclusion of two persons from the jury panel.

In the United States District Court for the Southern District of Georgia, when citizens are summoned for jury service, prospective male jurors are advised in the notice that they must wear a coat and tie to court. (Appendix C). When the clerk called the roll of prospective jurors in the present case, the trial judge asked juror number 38 — a male named Christopher McCall — whether he got the notice about proper dress. McCall answered, "Your Honor, I do not own a suit or a tie." Without any inquiry into McCall's ability to serve as a fair and impartial juror, the judge asked McCall to step aside. Another juror was called to take McCall's place.[2]

During the trial court's voir dire of the jury panel, another juror — Amanda Clark — disclosed that she had been convicted of possession of marijuana. The trial judge asked where she had been convicted and Clark stated that the conviction had occurred in Savannah. The trial judge did not ask whether the marijuana possession had been a felony

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(Cont'd)

to distribute and distribution of cocaine in violation of 18 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (counts 2-6); possession with intent to distribute and distribution of cocaine in violation of 18 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (counts 8-10); and possession with intent to distribute and distribution of cocaine in violation of 18 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (count 13).

2. The government neither sought nor opposed the exclusion of juror McCall.

or misdemeanor level offense;[3] nor did he determine whether Clark was sentenced under the Georgia First Offender Act which, even in felony cases, permits the discharge of a defendant without an "adjudication of guilt" and without the loss of "any of his civil rights or liberties" if the terms of probation or other requirements set by the court are satisfied. O.C.G.A. § 42-8-62(a). Based solely on the unexplored fact of Clark's marijuana possession conviction, the trial judge asked Clark to step aside as well.[4]

At the conclusion of voir dire and prior to the exercise of any peremptory strikes, Petitioner Hicks objected to the exclusion of both McCall and Clark. The trial judge overruled both objections.[5] (Appendix B).

As to McCall, the trial judge observed, "His hair was around his shoulders. He got specific instructions how to dress. We accommodate those people. We have coats and ties. And it just showed, to me, or demonstrated an uncaring attitude. He didn't care what the Court said to him. He was coming the way he was."

Despite being advised that Clark may have been convicted of misdemeanor marijuana possession only or may have had her civil rights restored under the Georgia First Offender Act, the trial judge adhered to his decision to exclude Clark without further inquiry or comment.

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3. In marijuana possession cases in Georgia, the great preponderance of first offenders are permitted to plead guilty to misdemeanor level possession. O.C.G.A § 16-13-2(b). The punishment for this offense would not result in automatic disqualification of a prospective juror under 28 U.S.C. § 1865(b)(5).

4. Again, the government neither sought nor opposed the exclusion this juror.

5. The government remained silent during this colloquy as well.

REASONS FOR GRANTING WRIT

This case calls for the exercise of this Court's supervisory authority over the lower federal courts. The grant of the writ would be particularly appropriate here because the trial court's exclusion of the two jurors seriously and substantially "departed from the accepted and usual course of judicial proceedings" under the Jury Selection and Service Act of 1968 and the Eleventh Circuit "sanctioned" this departure by affirming Hicks' conviction in a non-published opinion. Rules of the Supreme Court of the United States, Rule 10(a).

The Jury Selection and Service Act of 1968 was enacted to achieve two broad goals:

> It is the policy of the United States that all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1861. In general, this Act has functioned extremely well. It has substantially broadened the opportunity for citizens to serve on juries and thus has eliminated the historic abuses that gave rise to its passage such as the use of key man and blue ribbon juries and the use of "good character" as an eligibility requirement for

service. A prime reason for the Act's success is its clarity in laying out the standards of eligibility for jury service and in limiting severely the grounds for disqualification or exclusion. *See* 28 U.S.C. §§ 1862, 1863(b)(5)(A) and (6), 1865 and 1866(a), (b), (c), (d) and (g).

As will be demonstrated, the policy, purpose and certain specific provisions of this Act were flouted by the District Court in this case. The exclusion of jury panel members McCall and Clark harks back to an era in this nation's history when juries were sometimes constituted on the basis of exclusionary rather than inclusionary criteria. Then as now, the intervention of this Court in the exercise of its supervisory authority over the lower federal courts was necessary.

In *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946), this Court held that the Ninth Circuit abused its discretion when it sustained a California federal district court practice of automatically excluding from service all *daily* wage earners. In so doing, the Court observed:

> This does not mean . . . that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group of class matter. That fact lies at the

> very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Id. at 220.

The Court in *Thiel* also questioned the assumptions about daily wage earners implicit in the trial court's practice of automatically excluding them.

> Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners . . . constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social statute. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we cannot do.

Id. at 223-24.

Finally, the majority in *Thiel* responded tellingly to Justice Frankfurter's dissent which questioned whether the composition of the jury had any bearing on the outcome of the case and dismissively characterized the ruling as "burning the barn in order to roast the pig." *Id.* at 234. The majority in fact was greatly concerned about the subtle, sometimes glacial, erosion of sound jury selection practice and how that might ultimately lead to the erosion of the right to trial by jury itself.

> Jury is a duty as well as a privilege of citizenship . . . [A] blanket exclusion of all daily wage earners, however well intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial. "That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

Id. at 224-25.

The reversal in *Thiel* explicitly rested on the Court's exercise of its supervisory authority over the administration of justice in the federal courts.[6] In short, the error was of such magnitude this Court felt compelled to point it out for the guidance of all lower federal courts. There was no

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6. The Court in *Thiel* cited *McNabb v. United States*, 318 U.S. 332 (1943), a decision usually noted as the Supreme Court's first recognition of its supervisory authority over lower federal court proceedings.

doctrinal split among federal circuit courts on the issue. Nor was there any evidence that the exclusionary practice in *Thiel* was utilized in any jurisdiction except the Northern District of California.

Approximately six months after *Thiel*, the Supreme Court revisited the juror exclusion issue. At issue in *Ballard v. United States*, 328 U.S. 187 (1946), was the exclusion of women from both the grand and petit juries in a criminal trial in the Southern District of California. At the time *Ballard* was decided by the Court, the trial court had abandoned the practice of excluding women from jury service for at least two years. In the face of arguments from four dissenters that intervention was unnecessary,[7] the Court exercised its supervisory authority to reverse the conviction.

> We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts, *McNabb v. United States*, *supra*, to correct an error which permeated this proceeding.

Id. at 193. The Court elaborated:

> The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant — there is injury to the jury system, to

7. As in *Thiel*, the dissenters were again lead by Justice Frankfurter. *Ballard v. United States*, 328 U.S. 187, 197 (1946).

> the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Id. at 195.

From the perspective of this Court, indeed from the perspective of appellate courts generally, flaws in the jury selection process may well seem trivial in the context of a single case. When a person is wrongly excluded from jury service, how can an appellate court say that the decision of the jury actually trying the case was unfair? Indeed, when any juror is excluded from service, who is to say that the replacement juror is any more or less fair than the juror replaced? Without an adequate record reflecting a particularized reason for exclusion, the answer to that question is unknowable. Thus, in the qualification and selection of juries, meticulous procedural regularity is central to the principle recognized in *Thiel* and *Ballard* that eligibility for jury service depends on individualized factors, not stereotypes or generalizations.

The structure and text of the Jury Selection and Service Act of 1968 reflects that historical premise. The ideal of a randomly selected jury reflecting a fair cross section of the community is fundamentally inconsistent with a rule that males must wear a coat and tie in order to sit on federal juries in the Southern District of Georgia. More tellingly and more to the point, the use of such a criteria for disqualification – no matter how wisely it is administered — is *absolutely* unauthorized by the Act.

The keystone of the Act is the ban on discrimination based on race, color, religion, sex, national origin, and

economic status, 28 U.S.C. § 1862. The Act does permit class based excuses from jury service based on personal or occupational status but *only* upon individual request[8] and *only* if the district court has a plan finding that jury service by a member of the class would entail undue hardship or extreme inconvenience, 28 U.S.C. § 1863(b)(5)(A). The Act also allows disqualification from jury service if one of the five grounds set forth in 28 U.S.C. § 1865(b) is present. Once a juror is screened through these statutory provisions, the only basis for excusing him from a trial is one of the grounds set forth in 28 U.S.C. § 1866(c), none of which is applicable to this case and none of which was invoked by the trial judge or the government. The trial court's unilateral imposition of the coat and tie requirement on prospective juror McCall was a clear and legally untenable failure or refusal to follow the 1968 Act.

The Southern District of Georgia's dress code is also humiliating and degrading to the many male citizens of the district who may not own a coat and tie or who may prefer not to wear them. There is simply no basis in this record or in human experience generally suggesting that male jurors who fail or choose not to wear coats and ties to court are less attentive and less caring than other jurors. This Court is no doubt well aware that the Southern District of Georgia is largely rural. Most of the activities of daily life there, including going to church and to work, are performed without coat and tie. For some, the cost of a coat and tie is a financial burden. Interestingly, there is not a state trial court in that district (or elsewhere in Georgia) setting a dress code for

8. Physicians, for example, would be excused under this provision, as is the case in most plans under the Act. However, they must affirmatively ask the trial court to be excused; they are not forbidden from juror service.

prospective jurors. In fact, Petitioner has not been able to find a single jurisdiction in the United States with a juror dress code.

Ordinarily, in the trial of cases, if a prospective juror looks, dresses, acts or responds oddly, trial counsel must use a peremptory strike. That is the only stage where subjective factors — other than race or gender — can be applied in the jury selection process. It is certainly not the role of the trial judge to apply subjective criteria to determine whether otherwise qualified persons may sit on a jury panel. In this case, the trial judge not only excluded prospective juror McCall in violation of the Jury Selection and Service Act of 1968, he did so in the absence of a request from either the government or any of the defense counsel. The trial judge's actions below were the equivalent of a peremptory strike in favor of the government.[9]

Does a federal district judge have the authority to exclude persons from a jury panel on grounds that neither the government nor defense counsel could insist upon? Consider how the vast majority of judges in this nation — one would hope all — would respond to an objection for cause based

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9. If the logic of stereotypes is followed to its conclusion in this case which was a drug prosecution, the trial judge saved the government — which remained piously silent during the relevant colloquy — two of its peremptory strikes. Persons with long hair "around the shoulders" — such as McCall — are associated with tolerance of drug use in the minds of some. The record reflects nothing to indicate that this stereotype applied to McCall. In a similar vein, Clark had been convicted of marijuana possession that may have given rise to a bias sufficient to justify her exclusion for cause. More information was needed to find out. But the trial judge undertook no such inquiry.

on a prospective juror's mode of dress generally, not to mention the failure to wear a coat and tie. Few trial lawyers in America today would have the nerve to make such an objection and if any have done so in the past, they apparently have not pressed the issue at the appellate level.

In matters such as this, adherence to sound judicial practice is vital to the protection of the right to trial by jury. When trial counsel seeks to exclude a juror for cause, a specific ground must be shown. It must relate to the juror's legal eligibility to serve. The very requirement that a ground must be articulated and defended on the record provides some assurance that trial counsel will object for substantial reasons. In any event, if counsel disagree about the sufficiency of the objection, further questioning of the juror can be undertaken and argument can be heard. Ultimately, the trial court has an adequate basis in the record for a ruling. This does not happen when a trial judge acts unilaterally as occurred in the present case.

The value of procedural regularity in jury selection is illustrated by *United States v. Salamone*, 800 F.2d 1212 (3rd Cir. 1986). The court reversed a firearms conviction because the trial judge excluded from the jury all persons who were affiliated with the N.R.A.

> We find the government's position untenable and potentially dangerous. To allow trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of juror threatens the heretofore guarded right of an accused to a fair trial by an impartial jury as well as the integrity of the judicial process as a whole. Taken to its illogical

> conclusion, the government's position would sanction, *inter alia*, the summary exclusion for cause of NAACP members from cases seeking the enforcement of civil rights statutes, Moral Majority activists from pornography cases, Catholics from cases involving abortion clinic protests, members of NOW from sex discrimination cases, and subscribers to Consumer Reports from cases involving product liability claims.

Id. at 1225.

The court in *Salamone* emphasized what the Supreme Court said in *Thiel*: "Juror competence is an individual rather than a group or class matter." *Id.* at 1226. In the absence of a factual inquiry into whether a prospective juror will be able to apply the law fairly and impartially, there can be no exclusion for cause based on bias, prejudice or even disinterest. *Id. See also Tyus v. Urban Search Management*, 102 F.3d 256, 262 (7th Cir. 1997) (trial judge's voir dire actually injected prejudice into the proceeding); *United States v. Calabrese*, 942 F.2d 218 (3rd Cir. 1991) (jurors excluded because of knowledge of the defendants; held reversible error to do so in the absence of further particularized inquiry into bias). Even though procedural regularity did not prevent trial court error in *Salamone*, it heightened the potential for appellate review and ultimately lead to the correction of what was egregious error.

Salamone and the other cases cited shed light on what the trial judge below should have done if he thought juror McCall was not eligible to serve. He should have questioned him closely on factors relating to his ability to serve as a fair

and impartial juror. Then and only then could the trial judge have excluded McCall from service and only on grounds authorized by law. As the court in *Calabrese* noted, a trial judge cannot exclude jurors for cause on grounds that would be unacceptable if the initiative to exclude had come from trial counsel. 942 F.2d at 226.

The same holds true of the exclusion of juror Clark. Because she had been convicted previously of marijuana possession, she may have been subject to exclusion under 28 U.S.C. § 1865(b)(5). But, under Georgia law, because marijuana possession is a misdemeanor if the amount involved is less than an ounce and is routinely subject to the Georgia First Offender Act which results in the restoration of civil rights, O.C.G.A. § 42-8-62(a), the trial judge should not have stopped his inquiry when the fact of conviction alone was revealed.

Petitioner asks this Court to exercise its supervisory authority in this case for three reasons. First, the trial judge's actions, including the juror dress code, reflect an indifference to the both the spirit and the letter of the Jury Selection and Service Act of 1968. Second, they reflect a manifest and extreme departure from the requirements of the Act. Third, the procedure necessary to undertake a full factual inquiry into the grounds for excusing a juror for cause was totally lacking. Trial judges — federal as well as state — must remember that real rights are at stake during voir dire and, in some cases, it will matter greatly which jurors ultimately serve. Trial by an impartial and randomly selected jury is not an annoying judicial chore; it is still a constitutional and statutory right. The Eleventh Circuit refused to do what the circuit courts in *Salamone*, *Calabrese* and *Urban Management* did, which is to publicly and forthrightly rule. Those courts forcefully told the trial judges in each instance that they erred and that their predilections had to be subordinated to the requirements of the law.

Unfortunately, Petitioner must ask this Court to do what the Eleventh Circuit should have done. It is not often necessary to do so as the age of the *Thiel* and *Ballard* decisions indicates. But public and, in some instances, judicial impatience with the right to trial by jury is increasing. The solution is not to undermine the right, but to reaffirm it. On occasion, this Court must intercede to vindicate the requirements of federal law and simply correct error. *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). This case presents such an occasion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 23, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-08635

Non-Argument Calendar
D. C. Docket No. CR-497-231

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE HICKS, ANTHONY DAILEY,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Georgia

(April 23, 1999)

Before HATCHETT, Chief Judge, COX and BLACK, Circuit Judges.

PER CURIAM:

Willie Hicks and Anthony Dailey appeal their convictions of conspiracy to possess with intent to distribute

cocaine and cocaine base, in violation of 21 U.S.C. § 846, possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1).[1]

On appeal, Hicks and Dailey contend that the district court erred by: (1) excusing two prospective jurors without determining whether they were qualified to serve; (2) denying their motion for a new trial after the Government provided post-trial notice that its primary witness had given false information to the Government about the investigation; and (3) denying their motions for judgment of acquittal on Count 13 because there was insufficient evidence to prove beyond a reasonable doubt that either defendant possessed crack cocaine with the intent to distribute. Additionally, Hicks contends that the court erred by denying his motion to suppress.

We review the district court's *sua sponte* determination to excuse a juror for a manifest abuse of discretion. *See United States v. Simmons*, 961 F.2d 183, 184 (11th Cir. 1992). We conclude that the district court's decision to excuse one juror for failing to comply with instructions regarding the dress code[2] and another for having a

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1. Dailey was also convicted for using and carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

2. Appellants raised objections to excusing Chris McCall Number 38, for not being properly dressed. The trial court responded,

(Cont'd)

previous drug conviction[3] was within the court's sound discretion.

We review the denial of a motion for a new trial under an abuse of discretion standard. *See United States v. Michael*, 17 F.3d 1383, 1384 (11th Cir. 1994). Hicks and Dailey failed to show that, had they possessed the information in question, there was a reasonable probability of a different result. We conclude that the district court did not abuse its discretion in denying the motions.

This court will uphold a conviction if, after viewing the evidence in the light most favorable to the government, and drawing all reasonable inferences in its favor, " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Thomas*, 987 F.2d 697, 701 (11th Cir. 1993), *citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We conclude that there was sufficient evidence for a reasonable juror to find the defendants guilty of possession of cocaine as charged in Count 13.

Finally, the question of what amounts to probable cause is purely a question of law, and hence is subject to plenary

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(Cont'd)
"His hair was around his shoulders. He got specific instructions how to dress. We accommodate those people [that may not have a suit and tie]. . . And it just showed, to me, or demonstrated an uncaring attitude. He didn't care what the Court said to him. He was coming the way he was." (R.4-50.)

3. During voir dire, Juror Amanda Clark stated that she had been convicted of possession of marijuana.

review by this court, *See United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*). The search warrant affidavit contained sufficient factual allegations and provided probable cause to support the issuance of a search warrant for Hicks' residence. Thus, we conclude that the district court committed no error in denying Hicks' Motion to Suppress.

AFFIRMED.

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF JURY SELECTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED MARCH 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CR 497-231

UNITED STATES OF AMERICA

PLAINTIFF,

– vs –

WILLIE HICKS and ANTHONY DAILEY

DEFENDANT.

TRANSCRIPT of the **JURY SELECTION** held on the 2nd day of March, 1998, with the HONORABLE B. AVANT EDENFIELD, JUDGE, presiding

* * *

[2] THE COURT: Mr. Clerk, sound the next group.

CLERK: The Court sound the case the United States of America versus Willie Hicks and Anthony Daley, Criminal Action 497-231.

Appendix B

THE COURT: Mr. Knoche, what announcement?

MR. KNOCHE: Ready for the government, Your Honor.

THE COURT: Mr. Jackson, are you counsel in this case?

MR. JACKSON: Yes, sir. I am for Mr. Hicks, Your Honor.

* * *

MR. JACKSON: Yes, sir. We have co-counsel, Your Honor. So I think we need to approach.

THE COURT: Right. Come up here, Mr. Knoche.

MR. HUNT: Good morning, Your Honor.

* * *

[3] * * *

THE COURT: Please continue in this case.

CLERK: Ladies and gentlemen, as your name is called, please come forward and be seated as directed by the Marshal.

Number 44, Gene Poythress.

Appendix B

Number 6, Dorothy Campbell.

Number 20, Wanda Evans.

Number 50, Willie Seymore.

[4] Number 38, Christopher McCall.

THE COURT: Wait a minute. Did you get a notice as to dress?

MR. McCALL: Your Honor, I do not own a suit or a tie.

THE COURT: Have a seat over to the side.

Call another one.

CLERK: Number 28, Cynthia Johnson.

* * *

[16] * * *

THE COURT: Ladies and gentlemen, we about to commence the voir dire or voir dire, either pronunciation is acceptable. It simply means "to tell the truth".

Some of you will be serving as judges, that is you will judge the facts. The parties have every right, as does the Court, to know something about you. These questions are not meant to harass you or vex you or embarrass you. It

simply the questions that need to be answered truthfully in order for the parties to make their selection.

Now, do any of you hold an opinion that there should be no laws prohibiting the use of controlled substance like cocaine or crack cocaine or marijuana? Are you opposed to laws that criminalize the possession, use, and distribution of that substance?

Now, have any of you ever been convicted or do you have any close friend or relative who has been prosecuted by either the State of Georgia, State of [17] South Carolina, or any jurisdiction, or the federal government on any drug charge? If so, would the back row stand? This usually elicits several. I will let the others be seated.

All of you who raised your hand on the rear row, please stand.

Give up us your name and tell us something.

MS. EVANS: My name is Wanda Evans, and I have a relative who was convicted. It was — she served time. I don't know whether that —

THE COURT: But it had something to do with drugs.

MS. EVANS: With drugs, yes, sir, crack cocaine.

THE COURT: How long ago was that?

MS. EVANS: Maybe three years, three or four years.

THE COURT: Do you feel she was mistreated by having been convicted and imprisoned?

MS. EVANS: No, not really.

THE COURT: Thank you. You may have a seat.

MR. LIVINGSTON: Samuel Livingston. I have a son who just got off of drugs, and is doing good, but I have daughter-in-law any that's serving time for possession.

[18] THE COURT: Do you feel that they have been mistreated, that either one of them were mistreated by the way the law dealt with them?

MR. LIVINGSTON: No, sir.

THE COURT: Are you quite certain of that?

MR. LIVINGSTON: Yes, sir.

THE COURT: All right. Anyone before I leave the rear row?

The front row please stand.

MS. BARNES: My name is Lisa Barnes. A friend of mine of was convicted of marijuana possession.

THE COURT: How long ago was that?

MS. BARNES: Last year.

THE COURT: Do you feel that she was mistreated in any way?

MS. BARNES: Yes, he was because it was not proven that he had possession of it.

THE COURT: Did he plead guilty or was he found guilty?

MS. BARNES: He pleaded innocent but he was found guilty.

THE COURT: Would that in any way affect your judge in this case?

MS. BARNES: Yes, I think it would because if [19] it is the same Donald Brown in the case that I went to high school with, I don't think he would —

THE COURT: I will let you step aside.

Would you substitute, Mr. Clerk?

CLERK: As your name is called, please come forward go ahead and take the vacant seat.

MS. CLARK: My name is Amanda Clark. I have been convicted of possession of marijuana and I divorced my husband because he was hooked on crack cocaine.

THE COURT: Where were you convicted of the use of marijuana?

MS. CLARK: Here in Savannah.

THE COURT: I will have to ask that you step aside.

* * *

[50] * * *

MR. JACKSON: Yes, sir. Your Honor, likewise while we are at the bench, we would as that the record reflect our objections to excusing Chris McCall Number 38, for not being properly dressed.

THE COURT: His hair was around his shoulders. He got specific instructions how to dress. We accommodate those people. We have coats and ties. And it just showed, to me, or demonstrated an uncaring attitude. He didn't care what the Court said to him. He was coming the way he was.

MR. JACKSON: He might very well, he might [51] like our clients.

The other one is Amanda Clark. Although she was convicted of possession of marijuana, the Clerk before the Court came in asked whether or not anybody had not had their rights restored. That could be a misdemeanor. So they could be a first offender.

THE COURT: Well, I asked her, and people generally, I find, are reluctant to totally respond to the Clerk. I get a better response.

MR. JACKSON: Yes, sir. Thank you.

THE COURT: And you adopt all of his objections.

MR. HUNT: Yes, Your Honor.

THE COURT: All right.

* * * *

APPENDIX C — SUMMONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA FOR JURY SERVICE

SUMMONS FOR JURY SERVICE

• **from UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF GEORGIA
P. O. BOX 8286
SAVANNAH, GEORGIA 31412
GRAND JUROR

August 3, 1999 10:00 A.M.
Month Date Time

THIS COURT SUMMONS YOU TO APPEAR FOR JURY DUTY AT THE TIME AND PLACE SHOWN. YOUR TERM OF SERVICE IS DETERMINED BY THE COURT. IF THE EXACT DAY TO REPORT IS NOT GIVEN YOU WILL BE NOTIFIED LATER. IF AN EXACT DATE IS SHOWN YOU MUST REPORT ON THAT DAY UNLESS A PHONE MESSAGE OR OTHER NOTICE TELLS YOU OTHERWISE.

YOU WILL SERVE IN U.S. COURT HOUSE AT
3rd Floor Courtroom
U. S. COURTHOUSE
125 BULL STREET
SAVANNAH, Georgia

Phone No. 1-800-473-3116

* * *

Appendix C

CAUTION: NOTE ITEMS 2 & 3 ON BACK
MALE JURORS ARE EXPECTED TO WEAR COLLAR, TIE, AND COAT WHILE FEMALE JURORS WEAR PANTSUIT, SKIRT OR DRESS . . . NO JEANS/SHORTS ALLOWED.

JURORS WILL RECEIVE A DAILY ATTENDANCE FEE OF $40 PLUS EITHER MILEAGE OR THE COST OF PUBLIC TRANSPORTATION FROM RESIDENCE TO COURT AND RETURN. U.S. GOVERNMENT EMPLOYEES, INSTEAD OF THE ATTENDANCE FEE, WILL RECEIVE THEIR REGULAR PAY WITHOUT DEDUCTION FROM AUTHORIZED LEAVE.